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Supreme Court, U.S.
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No. 02-1599

In The Supreme Court of the United States

NEBRASKA PUBLIC SERVICE COMMISSION,

Petitioner,

v.

LINCOLN ELECTRIC SYSTEM, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nebraska

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

As demonstrated in the Petition, the Nebraska Supreme Court's holding that 47 U.S.C. § 253(a) preempts Nebraska's statutes prohibiting the state's political subdivisions from providing telecommunications services is contrary to decisions of other state and federal courts, who have split on the issue of whether § 253(a) clearly and manifestly demonstrates Congress' intent to preempt state laws which preclude their own political subdivisions from engaging in the telecommunications business. Further, as noted in the Petition, the Nebraska Supreme Court's conclusion that the phrase "any entity" in § 253(a) includes a state's political subdivisions is contrary to decisions of this Court recognizing that such broad, general language is insufficient to establish a clear and manifest intent by Congress to preempt states in the exercise of their historic power to establish the confines and parameters of the activities of their own political subdivisions.

Respondent LES advances several arguments in opposition to granting the petition. First, Respondent appears to contend NPSC was not a "party" to the proceedings below and thus cannot seek review of the Nebraska Supreme Court's decision. (Brief in Opp. at 9-10, 10 n.5). Second, Respondent argues review is not warranted because the decision below rests on an adequate, independent state law ground. (Brief in Opp. at 10-13). Third, Respondent contends the court below correctly applied this Court's preemption precedents. (Brief in Opp. at 13-20). Finally, Respondent contends the "asserted conflict" in judicial decisions interpreting the preemptive effect of § 253(a) with regard to state laws prohibiting the provision of telecommunications services by political subdivisions "is less than it appears" and thus does not warrant review.

(Brief in Opp. at 20-22). None of these contentions provide any basis for denying the Petition.

1. Respondent suggests that NPSC, while designated as a party by the Nebraska Supreme Court, was actually not a party to the proceedings below, but acted as a "neutral tribunal." (Brief in Opp. at 9-10, 10 n.5). LES further appears to imply that the Attorney General's decision not to file an amicus curiae brief in the Nebraska Supreme Court after receiving notice of the constitutional question pursuant to Neb. Sup. Ct. R. of Prac. and Proc. 9E (rev. 2002) somehow impacts NPSC's status as a party or its ability to seek review in this Court. (Brief in Opp. at 9-10).

The Court need look no further than the Nebraska Supreme Court's opinion to reject Respondent's claim that NPSC was not a party to the proceedings below. The Nebraska Supreme Court's caption of the case denominates NPSC as the "Appellee," and NTA as one of the "Intervenor-Appellees." (App. A-1). While NPSC did not file a brief in the Nebraska Supreme Court, and the Attorney General did not file an amicus curiae brief, that has no bearing on whether NPSC was a party to the proceedings below. Not only did the court below recognize NPSC as a party in its decision, it did so in denying NPSC's motion to stay issuance of the mandate, issuing an order again referring to "Appellee PSC." (App. A-25). There is no doubt that NPSC was recognized as a party to the appeal before the Nebraska Supreme Court.

The Nebraska Supreme Court's treatment of NPSC as a party is consistent with its recognition of NPSC as an appellee in other appeals from NPSC to the Nebraska Supreme Court involving orders issued by NPSC, including telecommunications orders. *See, e.g., In re Application*

of Nebraska Public Serv. Comm'n, 260 Neb. 780, 619 N.W.2d 809 (2000) (Listing NPSC as "Appellee" in appeal seeking review of NPSC order directing incumbent local exchange carriers ["ILECs"] to comply with order establishing multidwelling unit ["MDU"] regulations and a statewide policy for access to MDUs by competitive local exchange carriers ["CLECs"]); *In re Application of GCC License Corp.*, 264 Neb. 167, 647 N.W.2d 45 (2002) (Listing NPSC as "Appellee" in appeal seeking to overturn NPSC order designating wireless telecommunications carrier as an eligible telecommunications carrier ["ETC"] under 47 U.S.C. § 214(e)(2)). Indeed, it is somewhat ironic that LES would contend that NPSC is not a party to an appeal of this nature in view of the fact that counsel of record for Respondent is a member of the law firm that represented GCC in the latter case, in which NPSC appeared and filed a brief on behalf of "appellee Nebraska Public Service Commission." 264 Neb. at 168, 647 N.W.2d at 47-48. The Nebraska Supreme Court's decision, as well as these other cases decided by the Nebraska Supreme Court involving appeals of NPSC orders, establish that NPSC was a party to the appeal in the Nebraska Supreme Court. As such, NPSC may seek review by this Court of the Nebraska Supreme Court's decision.

In apparently challenging NPSC's status as a party, Respondent does not discuss Nebraska Supreme Court decisions involving appeals from NPSC orders recognizing NPSC as a party, but instead refers to the provision for judicial review of "contested case" proceedings under Nebraska's Administrative Procedure Act ["APA"], Neb. Rev. Stat. § 84-917 (1999). (Brief in Opp. at 10 n.5). The appeal provisions in Nebraska's APA have no application to appeals from orders entered by NPSC. *Nebraska Public*

Service Comm'n v. Nebraska Public Power Dist., 256 Neb. 479, 486-87, 590 N.W.2d 840, 846 (1999) (Appeal provisions of APA do not apply to NPSC appeals, as the Legislature has provided a specific method of appeal from NPSC pursuant to Neb. Rev. Stat. §§ 75-136 and 75-137 (Cum. Supp. 2002)). Respondent also cites *Karnes v. Wilkinson Mfg. Co.*, 220 Neb. 150, 368 N.W.2d 788 (1985) in support of its claim that NPSC is not properly viewed as a party. (Brief in Opp. at 10 n.5). *Karnes* is inapposite because it concerned application of the review provisions of the APA which, as noted, the Nebraska Supreme Court has held do not apply to NPSC. *Karnes* involved construction of the APA provision allowing a "person aggrieved" by an agency decision to seek judicial review. 220 Neb. at 152, 368 N.W.2d at 789. The Nebraska Supreme Court held that the Tax Commissioner, who was a member of the State Board of Equalization and Assessment, was not a "person aggrieved" who could appeal an order of the State Board, as the "commissioner could hardly have been 'aggrieved' by her own decision." *Id. Karnes* has no application to the instant case, as it involved the limited situation where an individual member of a state board attempted to appeal from a decision of the board, and the Nebraska Supreme Court's finding that, under the specific review statute, an individual board member was not authorized to pursue an appeal. In contrast, the Nebraska Supreme Court has consistently recognized that NPSC is a party to appeals of orders entered by NPSC taken pursuant to §§ 75-136 and 75-137.

Indeed, if NPSC is not a party, then the State of Nebraska would have to be notified of the constitutional question raised in the petition for a writ of certiorari filed by NTA by service of written notice on the Nebraska

Attorney General. Pursuant to 28 U.S.C. § 2403(b), if the constitutionality of a state statute "affecting the public interest" is drawn in question in a federal court proceeding to which the state or an officer or agency thereof is not a party, the court must certify that fact to the state attorney general and shall permit the state to intervene as of right with respect to the question of constitutionality. As applied to proceedings in this Court, § 2403(b) would require that, if NPSC is not a party, the Nebraska Attorney General be notified of the question raising the constitutionality of Nebraska's statutes prohibiting political subdivisions from providing telecommunications services presented by NTA, and the State would be entitled to intervene as a matter of right in this Court to defend the constitutionality of Nebraska law. United States Supreme Court Rule 29.4(c); *see Estate of Thornton v. Caldor, Inc.*, 465 U.S. 1098 (1984), 472 U.S. 703, 708 n.7 (1985). It is not necessary for the State to be noticed and to intervene, however, as NPSC is a party.[1]

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[1] Respondent correctly notes that the Nebraska Attorney General received notice of the constitutional question involved in the appeal pursuant to Neb. Sup. Ct. R. of Prac. and Proc. 9E (rev. 2002), and that the Attorney General did not file an amicus curiae brief in the Nebraska Supreme Court, as permitted by Rule 9E. (Brief in Opp. at 7). NPSC's petition acknowledges this fact. (Petition at 5 n.3). Under Rule 9E, the filing of an amicus curiae brief by the Attorney General is discretionary and, even if the Attorney General participates, it is not in the capacity of a party. The Attorney General's election not to file an amicus curiae brief in the Nebraska Supreme Court when the constitutional issue had been addressed by NTA has no bearing on NPSC's status as a party. Nor would it have any impact on Nebraska's right to intervene and participate in the proceedings in this Court initiated by NTA under Rule 29.4(c) and 28 U.S.C. § 2403(b) in the event NPSC is deemed not to be a party to the proceedings below.

2. Respondent also incorrectly asserts that review should be denied because the Nebraska Supreme Court's decision rests on an adequate and independent state law ground. (Brief in Opp. at 10-13). In a companion petition for a writ of certiorari, two other parties to the proceedings below, the Nebraska Telecommunications Association ["NTA"] and the Nebraska Cable Communications Association ["NCCA"], have also sought review of the Nebraska Supreme Court's erroneous decision that § 253(a) preempts Nebraska's statutes prohibiting political subdivisions such as Respondent from providing telecommunications services for hire. *Nebraska Telecommunications Ass'n, et al. v. City of Lincoln, d/b/a Lincoln Electric System*, No. 02-1591. Petitioners NTA and NCCA have fully addressed Respondent's erroneous claim that the Court should decline review on this basis. (Reply Brief for Petitioners NTA and NCCA, Case No. 02-1591, at 2-6). Petitioner NPSC joins in the arguments advanced by NTA and NCCA urging the Court to reject Respondent's claim that an adequate and independent state law ground justifying denial of review is present in this case.

3. Respondent further contends review should be denied because the Nebraska Supreme Court correctly applied the Court's preemption precedents, particularly, the "plain statement" rule set forth in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). (Brief in Opp. at 13-15). Respondent also asserts the decision of the court below is consistent with the Court's decisions in *Salinas v. United States*, 522 U.S. 52 (1997) and *United States v. Gonzales*, 520 U.S. 1 (1997). (Brief in Opp. at 15-18).

Contrary to Respondent's claim, the Petition demonstrates that the Nebraska Supreme Court's opinion conflicts with decisions of this Court recognizing that the use

of broad general language such as the phrase "any entity" in § 253(a) is insufficient to provide the "plain statement" required to "clearly" and "manifestly" express Congress' intent to alter the usual balance of federal and state powers by limiting the states' historic power to establish the confines and parameters of the activities to be engaged in by their own political subdivisions. (Petition at 12-19). Moreover, as explained in the petition filed by NTA and NCCA, Respondent's claim that the Court's decisions in *Salinas* and *Gonzales* support the holding of the court below is incorrect, because "[n]either *Salinas* nor *Gonzales* involved a substantive application of the 'plain statement' rule to an ambiguous federal statute which 'could be' read as invading the traditional powers historically reserved to the States." (Petition of NTA and NCCA, Case No. 02-1591, at 17). The Nebraska Supreme Court's erroneous application of this Court's precedents merits review.

4. Finally, Respondent asserts that review is not warranted because the decisional conflict cited by Petitioners "is less than it appears." (Brief in Opp. at 20). Respondent even goes so far as to suggest that the FCC may deal with the conundrum it faces by virtue of the conflict presented by the Eighth Circuit's decision in *Missouri Municipal League v. FCC*, 299 F.3d 949 (8th Cir. 2002) and the D.C. Circuit's contrary opinion in *City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999) by simply "rejecting" the decision in *City of Abilene*. (Brief in Opp. at 21).

Respondent's attempt to minimize the clear decisional conflict involving the question presented must be rejected. This case, like *Missouri Municipal League*, squarely presents an important question of federal law on which lower courts have reached differing conclusions which only

this Court can definitively resolve. Absent final resolution by this Court of the question of whether § 253(a) manifests a clear intent by Congress to prohibit states from barring their political subdivisions from engaging in providing telecommunications services, the answer to this question will be different, depending on the jurisdiction in which it is raised. The importance of this question, and the difficulty presented by the conflicting decisions it has generated, is obvious in light of the petition for writ of certiorari filed on behalf of the United States and the FCC seeking review of the Eighth Circuit's decision in *Missouri Municipal League*. The goal of uniform application of federal law cannot be achieved if review is not granted.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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